In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 504

THE STILLEY PLYWOOD COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (P. A. 345)[1] is reported at 199 F. 2d 319. The findings of fact,

[1] By stipulation (P. A. 349), the printed record before this Court consists of two separately paginated volumes: the appendix to the Board's brief in the court below, herein designated "B. A.", and the appendix to the petitioner's brief in the court below, designated "P. A." The proceedings in the court below are bound at, and paginated continuously from, the end of the appendix to petitioner's brief.

conclusions of law, and order of the Board (B. A. 179-199, 20-143) are reported at 94 NLRB 932.

JURISDICTION

The decree of the court below was entered on October 13, 1952 (P. A. 347-348). The petition for a writ of certiorari was filed on December 15, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the finding of the Board, affirmed by the court below, that the relationship of one Graham Holt to petitioner was that of foreman rather than that of independent contractor.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

In the spring of 1947, the International Brotherhood of Pulp, Sulphite & Paper Mill Workers of the United States and Canada, A. F. L., hereafter called the Union, began an organizational campaign at petitioner's plant and shortly thereafter requested petitioner to bargain with it (B. A. 25). Upon petitioner's refusal to bargain with the Union until it had been certified by the Board as

exclusive representative, the Union filed a representation petition with the Board, and the Board directed that an election be conducted among petitioner's production and maintenance employees, including its woodland or logging employees, to determine whether or not they desired to be represented by the Union (B. A. 48-51). At the representation hearing, petitioner agreed that the bargaining unit should include the employees engaged in its woodland operations, and stated that no substantial decrease in the number of its employees was contemplated (B. A. 83-84). The Union won the ensuing election and it was certified as the representative by the Board (B. A. 49).

The Board found that before the election petitioner engaged in interrogation, surveillance, and threats designed to prevent unionization of the petitioner's employees (B. A. 27-30, 180-181). The Board further found that after the election, and before the Union was certified on April 12, 1948, petitioner engaged in similar conduct (B. A. 30-37, 180-181). In addition, the Board found that subsequent to the Union's certification, during protracted negotiations covering a period of nearly one year, petitioner's entire course of conduct evidenced an intention to avoid reaching any agreement with the Union (B. A. 52-69). Such conduct included, among other things, the abrupt discharge of two of the Union's negotiators (B. A. 58, 91-96), the refusal to furnish the Union with wage data needed for purposes of bargaining (B. A. 56-59, 62), the adoption of a wage reduction without

consulting the Union (B. A. 66-67), and the refusal to reinstate a number of employees who had struck because of petitioner's refusal to bargain in good faith (B. A. 109-131). Finally, the Board found that, as part of petitioner's failure to bargain in good faith, petitioner refused to bargain with the Union concerning the logging employees whom the Board had included, without objection by petitioner, in the appropriate unit represented by the Union (B. A. 80-91, 181-182).

Petitioner does not dispute the Board's findings except with respect to petitioner's obligation to bargain with the Union concerning the logging employees. Petitioner urges that because of a change in operations these employees ceased to be in its employ and became employees of an independent contractor. The Board's findings of fact on this issue may be summarized as follows:

Subsequent to the Union's certification, petitioner and the Union met briefly on May 1, 1948, when they set May 10 as the date for the commencement of contract negotiations (B. A. 52). However, before May 10, without consulting the Union, petitioner entered into an arrangement by which its foreman, Graham Holt, purported to take over petitioner's logging operations as an independent contractor (B. A. 84).[2] Until then, Holt had super-

[2] Throughout the negotiations, petitioner insisted that the unit to be covered by any contract should be "the regular employees of the Stilley Plywood Company, Inc., normally engaged in production and maintenance in the Employer's Plant and woodland operations, insofar as these operations are continued by the Company" (B. A. 54, 58-60).

vised the logging operations under the general direction of petitioner's logging superintendent (B. A. 82; 269). Pursuant to an oral understanding, terminable at will, Holt, who has never contracted to cut timber for anyone other than petitioner, agreed to handle petitioner's logging operations on a piece-rate basis, and took over almost all of petitioner's logging employees at the same rate of pay they were then receiving (B. A. 84, 86, 89-90; 518, 523, 526, 529). This ostensible transfer produced virtually no change in the method of conducting the logging operations. As in the past, petitioner's superintendent of logging designated which of petitioner's tracts was to be logged and gave Holt instructions regarding the size and kind of timber to be cut (B. A. 89; 522, 534). In addition, petitioner's superintendent informed Holt how much he would be paid for the logs, and Holt testified that he was always satisfied with the price (B. A. 89-90; 526-527, 542-543).

Holt had almost no equipment when he entered this arrangement. Petitioner sold several trucks to him on credit, taking back chattel mortgages as security. Although petitioner claimed that these trucks were subsequently paid for, at the time of the hearing they were still registered in petitioner's name, carried petitioner's license plates, and were covered by insurance taken out in petitioner's name (B. A. 86; 540-541; P. A. 33-334). In addition, Holt purchased some of his gasoline and oil from petitioner's company store on credit, and truck replacement parts purchased by Holt were often

billed to petitioner, which then deducted their cost from sums due Holt for the logging (B. A. 87-88; 515-516, 534). Petitioner also supplied Holt with all the heavy equipment used for logging, and until January 1949, furnished the parts and maintenance for such equipment (B. A. 87; 510, 525). After that date Holt was required to maintain this equipment himself, but the mechanic hired by Holt admittedly did all his work in petitioner's repair shop, used petitioner's equipment and tools, and often obtained parts from petitioner's maintenance foreman (B. A. 87; 528, 533). Holt also purchased two of the three chain saws used for logging from petitioner on credit, and used petitioner's shop facilities for sharpening and maintaining these saws (B. A. 87, n. 51; 435, 519).

At the hearing, Holt showed a considerable lack of knowledge of matters which, as the Board found, a genuinely independent contractor would ordinarily know. He did not know the conditions under which petitioner could terminate their arrangement or even that it was terminable at will (B. A. 89; 523). Moreover, he was unable to state whether he pays business taxes as an independent contractor, whether he is registered as such in his county, or whether his equipment is covered by insurance (B. A. 89; 519, 540-541). Holt further stated that he does not maintain a separate bank account in connection with the logging operations and that his bookkeeping is performed in petitioner's office by petitioner's bookkeeper for a monthly fee (B. A. 88, n. 53; 520, 605).

The Board found that Holt did not have the status of an independent contractor; that the logging employees thus remained in petitioner's employ; that the arrangement between petitioner and Holt was a pretext to avoid bargaining with the Union concerning the logging employees; and that petitioner therefore failed in its obligation to bargain in good faith with the Union as the representative of such employees (B. A. 88-90, 181-182).

With an immaterial modification, the court below, in a *per curiam* opinion, affirmed all of the findings of the Board, holding that "the findings and order of the Board are sustained by substantial evidence on the whole record" (B. A. 346). The court expressly observed that "there can be no doubt that its [the Board's] findings with respect to refusal to bargain in good faith . . . are . . . amply supported" (*ibid.*).

ARGUMENT

Petitioner's sole contention (Pet., p. 11)—that Holt should have been found to be an "independent contractor" who had taken over petitioner's logging employees, rather than merely petitioner's foreman supervising such logging employees—presents primarily a factual issue which does not warrant review by this Court. *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, 757 (C. A. 3), certiorari denied, 342 U. S. 919 (truck drivers); *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983, 986 (C. A. 7), certiorari denied, 335 U. S. 845 (insurance salesmen); *National Labor Relations*

Board v. *Blount*, 131 F. 2d 585, 590 (C. A. 8), certiorari denied, 318 U. S. 791 (miners); *Dimmitt-Rickhoff-Bayer Real Estate Co.* v. *Finnegan*, 179 F. 2d 882, 883 (C. A. 8), certiorari denied, 340 U. S. 823 (real estate salesmen). In any event, the Board's findings, sustained by the court below, are amply supported.

Claiming that the question whether Holt is an independent contractor is "governed by the law of the State of South Carolina," petitioner urges that the finding of the Board, affirmed by the court below, is erroneous under South Carolina law (Pet., p. 11). To support its view, petitioner cites *McDowell* v. *Stilley Plywood Co.*, 210 S. C. 173, 41 S. E. 2d 872, contending that a "nearly identical" arrangement was found by the South Carolina Supreme Court to establish an independent contractor relationship for the purpose of the South Carolina Workmen's Compensation Act (Pet., pp. 12-14).

The substantial differences between the facts in the instant case and those disclosed on the face of the opinion in *McDowell* preclude an assumption that the South Carolina courts would hold that Holt acquired the status of an independent contractor. But even if they would, it is settled that local law does not control the determination of a person's status for the purpose of the National Labor Relations Act. "Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be ad-

ministered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems". *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 123; accord: *Rabouin* v. *National Labor Relations Board,* 195 F. 2d 906, 910 (C. A. 2); *National Labor Relations Board* v. *Dalton Telephone Co.,* 187 F. 2d 811 (C. A. 5); *National Labor Relations Board* v. *Blount,* 131 F. 2d 585, 590 (C. A. 8), certiorari denied, 318 U. S. 791.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall

cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.* * *

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